K. Riback

Comptroller General
of the United States
Washington, D.C. 20548

145950

Decision

Matter of: A.R.E. Manufacturing Company, Inc.

File: B-246161

Date: February 21, 1992

Robert L. Cohn, Esq., for the protester.
Dal Stiltner Dameron, Esq., and Charles L. Bidwell, Esq., McKenna & Cuneo, for Keco Industries, Inc., an interested party.
Vera Meza, Esq., and Carol Rosenbaum, Esq., Department of the Army, for the agency.
Katherine I. Riback, Esq., John W. Van Schaik, Esq., and John Brosnan, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. A protest that a solicitation is not for the reprocurement of items under defaulted prior contract concerns an alleged impropriety apparent on the face of the solicitation and is untimely where solicitation stated that it was for a "reprocurement" and the protest was not filed prior to bid opening.

2. A reprocurement of a defaulted contract for air conditioners may not be awarded to the defaulted contractor at a price greater than the defaulted contract. Where agency, on reprocurement, uses revised specifications, it is appropriate for the agency to determine if those specification changes increase the cost of performance and if so to take that into account in determining whether the defaulted contractor's price on the reprocurement exceeded the price that it may be paid.

DECISION

A.R.E. Manufacturing Company, Inc., a defaulted contractor under contract No. DAAK01-87-D-A160 for air conditioners, protests the rejection of its bid under invitation for bids (IFB) No. DAAK01-91-B-0161, issued by the Department of the Army as a reprocurement of the requirement represented by the defaulted contract. A.R.E. argues that the protested solicitation is not a reprocurement of air conditioners identical to the items sought under the prior defaulted contract and that, as the low bidder, it should have received the award.

We dismiss the protest in part and deny it in part.

A.R.E. was awarded requirements contract No. DAAK01-87-D-A160 for 36,000 BTU vertical air conditioners on September 25, 1987. A.R.E.'s unit prices for the first and second ordering periods were $3,569.69 and $3,539.69, respectively. Under this contract, the air conditioners, with National Stock Number (NSN) 4120-01-268-0441, had to conform to military specification MIL-A-52767C. Units built to that specification accept 50/60 Hertz (Hz) power and many components of the units were specified on source controlled drawings.[1]

The Army terminated A.R.E.'s contract for default on August 31, 1989, due to A.R.E.'s inability to perform. On May 3, 1991, the Army issued the protested solicitation for a requirements contract for air conditioners for one mandatory delivery period and two optional periods. The cover sheet of the solicitation contained the words "REPROCUREMENT OF DEFAULTED CONTRACT DAAK01-87-D-A160" and identified the NSN of the air conditioners to be procured as 4120-00-926-4136. This solicitation also expressly stated that the air conditioners were to be manufactured according to military specification MIL-A-53089. Under this specification, the air conditioners are to have multiple power input (MPI) technology, which is the capability to accept 400Hz as well as 50/60Hz power. Also, some electrical parts were replaced with an electronic motor controller and logic assembly in order to accept the varying power inputs, although the units retain many electrical components.

In addition, to provide space for the motor controller and logic assembly, the agency changed the placement of brackets, bulkheads and other sheet metal parts. The MPI feature eliminated the need for a hot-gas bypass, and therefore permitted the use of simplified tubing. Also, the MPI feature relaxed the source restrictions for fans and motors, allowing increased competition to supply those components.

The agency received seven bids in response to this solicitation. A.R.E. submitted the lowest bid of $5,715 per unit for the first year of the contract. This price is 60 percent higher than A.R.E.'s price on the defaulted contract.

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[1]Source controlled drawings require that the specified components be supplied only by companies listed on the drawing.

The Army reports that the contracting officer determined that she lacked the authority to award a reprocurement contract to A.R.E. at a higher price than paid under the defaulted contract. Also, according to the agency, since changes had occurred in the specifications for the air conditioners subsequent to the default, the contracting officer decided to take those changes into account in determining whether A.R.E. had exceeded its defaulted contract price. The contracting officer determined that the addition of MPI technology justified an increase of 28 percent, or $999, in the unit price of $3,569.69 under A.R.E.'s defaulted contract. Since the result, $4,568.69 ($3,569.69 + $999), was not as high as the $5,715 per unit A.R.E. bid on the reprocurement contract, the contracting officer concluded that the changed specifications did not account for the disparity between A.R.E.'s prices on the original contract and the reprocurement, and rejected A.R.E.'s bid.

A.R.E. argues that the protested solicitation is not a reprocurement of the defaulted contract because the solicitation does not call for substantially identical air conditioners due to the specification changes, and because as the result of a March 1991 settlement of an action instituted by A.R.E. in the United States Bankruptcy Court, the government has agreed to waive its rights to any excess reprocurement costs. Therefore, the protester argues the rule that applies to reprocurements--prohibiting award of the reprocurement contract to the defaulted contractor at a higher price than paid under the defaulted contract--does not apply here. Alternatively, A.R.E. argues that if the protested solicitation is a valid reprocurement of the defaulted items, the contracting officer underestimated the value of the specification changes credited to A.R.E.'s price.

We first conclude that A.R.E.'s contention that the solicitation is not a reprocurement is untimely. Under our Bid Protest Regulations, a protest based upon an alleged impropriety apparent on the face of the solicitation must be filed prior to bid opening. 4 C.F.R. § 21.2(a)(1) (1991), as amended by 56 Fed. Reg. 3759 (1991). Here, the cover sheet labeled the solicitation as a "REPROCUREMENT OF DEFAULTED CONTRACT DAAK01-87-D-A160" and the solicitation also stated that the air conditioners were to be manufactured in accordance with updated specifications that included the MPI technology. If A.R.E. had any objection to the agency's treating this solicitation as a reprocurement of the defaulted contract, the firm was required to protest prior to bid opening. Since it failed to do so, this allegation is untimely and will not be considered.

Roadmaster Trailers Unlimited, Inc., B-237385, Jan. 8, 1990, 90-1 CPD ¶ 34.[2]

We find no merit to A.R.E.'s contentions that the agency underestimated the value of the MPI technology and that a proper calculation of the value of the changed requirements would result in a determination that A.R.E.'s bid does not exceed the price of the defaulted contract.

Initially, we think the contracting officer, recognizing the longstanding rule that a reprocurement contract may not be awarded to the defaulted contractor at a price greater than the terminated contract price because such an award would be tantamount to a modification of the original contract without consideration, PRB Uniforms, Inc., 56 Comp. Gen. 976 (1977), 77-2 CPD ¶ 213; Air Inc., B-233501, Nov. 22, 1988, 88-2 CPD ¶ 505, properly decided that the value of the specification changes should be taken into account in determining whether A.R.E.'s prices under the current solicitation could be accepted. In this respect, since the default clause contained in the original contract--see Federal Acquisition Regulation § 52.249-8--did not restrict a reprocurement to identical items but clearly contemplated the reprocurement of "similar" items, and since a change in specification requirements that increases performance costs will entitle a contractor to additional compensation, see clause entitled "Changes-Fixed Price" set forth at FAR § 52.243-1, we think the defaulted contractor could not properly be held to its original prices when a reprocurement of "similar" items involves a change in the cost of performance. Thus, we view the agency's downward adjustment of the price bid on the upgraded air conditioners to reflect the cost of the specification changes as an appropriate application of the rule that a reprocurement contract may not be awarded to the defaulted contractor at a price

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[2]A.R.E. requests that we consider the merits of these allegations under the "good cause" or "significant issue" exceptions to our timeliness regulations. 56 Fed. Reg. 3759 (1991) (to be codified at 4 C.F.R. § 21.2(c)). We see no basis to do so. First, although A.R.E. argues that the agency's failure to advise it of the "effect" of the reprocurement constitutes good cause, the solicitation was clearly labeled as a reprocurement and nothing that the agency did, or failed to do, prevented A.R.E. from filing a timely protest concerning the terms of the solicitation. Second, the untimely issues raised by A.R.E. do not fall under the significant issue exception because they relate only to this specific procurement and do not have widespread significance to the procurement community. See NPF Servs. Inc.--Recon., B-236841.2, Jan. 3, 1990, 90-1 CPD ¶ 9.

greater than the terminated contract price. See Ace Reforestation, Inc., AGBCA No. 84-272-1, 87-3 BCA ¶ 20,218 (where a similar method is used to determine the extent of reduction in the amount of excess costs for which a defaulted contractor is liable.)

The most significant change in the specifications was the addition of the MPI technology, which the contracting officer concluded added to the cost of the air conditioners. The contracting officer used two methods to determine the value of the added MPI technology. First, the project engineer, based on his work with a solicitation for 18,000 BTU air conditioners with the MPI technology, estimated that technology would add approximately 27 percent to the price of the units under the defaulted contract. Second, the contracting officer considered the awardee's price on a 1990 contract for similar 36,000 BTU horizontal air conditioners with the MPI technology. On that solicitation, $1,665 or 28 percent of the awardee's bid of $5,599, was for the MPI technology. Although the contracting officer used 28 percent as the value of the specification changes for purposes of the price comparison, she also concluded that other specification changes should have resulted in less of an increase on the reprocurement. For instance, the contracting officer noted that the reprocurement solicitation deleted certain items, such as the hot-gas bypass, and that the relaxed source restrictions on some components also should have reduced the price of the units.

Among numerous other contentions, A.R.E. argues that in determining the value of the MPI technology, the contracting officer should have considered that the $5,716 price for the first year quantity bid by A.R.E. was within the government's $6,000 estimate of the per unit price for the air conditioners on the reprocurement solicitation. Also, A.R.E. argues that the contracting officer unreasonably relied on the lowest prices submitted on the 1990 contract to determine the value of the MPI technology. In this respect, A.R.E. notes that the average of the prices submitted under that solicitation for the MPI technology was approximately $3,700, significantly more than the $1,665 which the agency allowed for purposes of its cost comparison. In addition, among numerous other allegations, A.R.E. maintains that the agency did not consider additional costs associated with the MPI technology, such as integration and additional testing and did not consider the costs of other changes in the specifications such as additional quality assurance, inspection and testing associated with the use of specification control components rather than source control components.

We think the method used by the contracting officer and the result reached in this case were reasonable. Although $6,000 was the government's estimate of the cost of the units on the reprocurement solicitation, and that estimate is higher than the $5,716 per unit bid by A.R.E., as the agency explains, such an estimate is usually prepared for budgeting reasons and we agree with the agency that the amounts bid and paid for the MPI technology on previous contracts are more useful to establish the actual value of the MPI technology.

In this respect, while A.R.E. argues that the contracting officer should have considered the higher average cost of MPI technology among the eight bidders on the 1990 solicitation, rather than the lowest priced bid, we think that limiting consideration to the actual contract price paid to the low bidder was reasonable. Moreover, the agency points out, and A.R.E. does not dispute, that the three lowest bidders all offered lower prices for the MPI technology than the $2,146 increase of A.R.E.'s bid on the reprocurement over its price on the defaulted contract.

Further, while A.R.E. maintains that the agency did not consider the increased costs associated with all of the specification changes, the agency reports that it considered all of the changes. In addition, we note that A.R.E.'s estimate of the increased costs related to quality assurance, testing, inspection, etc. of the motor controller and logic assembly was only 2 percent. Finally, as the agency explains, dropping the source restriction on a number of components can be expected to result in decreased prices due to increased competition for those components.

Although we have not specifically addressed all of A.R.E.'s numerous contentions regarding the contracting officer's calculations, we have considered them in reaching our conclusion. While the contracting officer could have used a number of methods and could have considered additional information to place a value on the specification changes for purposes of the cost comparison, we think that the method used and the result reached here were reasonable.

Finally, in its comments submitted in response to the Army's report on the protest, for the first time, A.R.E. argued that due to a decision of the bankruptcy court subsequent to the default, A.R.E., the protester, is not the same entity as the defaulted contractor, and therefore, the Army should not have treated it as a defaulted contractor in the reprocurement. Under our Regulations, an allegation such as this must be filed within 10 working days of when the basis of protest is known or should have been known, whichever is earlier. 4 C.F.R. § 21.2(a)(2) (1991). Where, as here, a protester supplements a timely protest with a new and

independent ground of protest, the newly raised allegation must independently satisfy the timeliness requirements. Holmes & Narver, Inc., B-239469.2; B-239469.3, Sept. 14, 1990, 90-2 CPD ¶ 210. A.R.E. knew when it filed its protest on October 10, 1991, that the contracting officer considered the firm to be the defaulted contractor. Since A.R.E. waited until it filed its December 17 comments on the agency report before it argued that it should not be considered the defaulted contractor, this issue is untimely and will not be considered.

The protest is dismissed in part and denied in part.

James F. Hinchman
General Counsel